Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Southern New England Telephone Company	)	
	)	
	)	File No. _____
Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities	)	

EMERGENCY REQUEST FOR DECLARATORY RULING AND PREEMPTION

The Southern New England Telephone Company ("SBC Connecticut") respectfully requests that the Commission issue a declaratory ruling and order preempting a decision by the Connecticut Department of Public Utility Control ("DPUC") that is inconsistent with the federal Telecommunications Act of 1996 ("1996 Act") and this Commission's *Triennial Review Order*,[1] and that directly frustrates the implementation of federal law.

In its *Final Decision*,[2] the DPUC held that SBC Connecticut must provide unbundled access to certain hybrid fiber-coaxial ("HFC") facilities to Gemini Networks CT, Inc. ("Gemini"), a competitive local exchange carrier ("CLEC") operating in Connecticut. The DPUC invoked the 1996 Act, this Commission's implementing decisions, and Section 16-247b of the Connecticut General Statutes (which expressly requires that the DPUC act consistently

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.) ("*Triennial Review Order*").

[2] Final Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Dec. 17, 2003) ("*Final Decision*") (attached as Exhibit A hereto).

with federal law) as providing the legal authority to order unbundling. Yet the DPUC directed SBC Connecticut to unbundle its decommissioned HFC network notwithstanding the DPUC's conclusion that the HFC facilities are "equivalent" to the hybrid fiber-copper loops that this Commission held need not be unbundled in the *Triennial Review Order*, and notwithstanding the facts that these facilities are not part of SBC Connecticut's telecommunications network and that SBC Connecticut does not use, and has never used, them to provide telecommunications services.

The DPUC based its determination on Gemini's self-serving claims of impairment, ignoring this Commission's express rejection of a carrier- or business plan-specific impairment analysis. Moreover, the DPUC refused to consider the availability of other unbundled network elements ("UNEs") offered by SBC Connecticut and used by every other competitive carrier in Connecticut for provisioning narrowband voice service. Indeed, the DPUC had no evidence before it either that carriers would be competitively impaired in the absence of unbundling or that it was technically feasible to unbundle the subject coaxial facilities. Rather, the DPUC simply believed that unbundling would assist Gemini in effectuating its business plan. A prompt ruling by this Commission preempting the DPUC's *Final Decision* is essential to preserving the integrity of federal law and the federal unbundling regime, and to ensuring that SBC Connecticut does not suffer irreparable harm.

The DPUC's *Final Decision* is inconsistent the 1996 Act and the federal implementing regime in at least five respects:

- *First*, the *Final Decision* compels SBC Connecticut to unbundle facilities that do not meet the definition of a network element as they have never been used, and are not readily capable of being used, to provide telecommunications services. *See* 47 U.S.C. § 153(29), (46).

- *Second*, the HFC facilities are not part of SBC Connecticut's local telecommunications network. As with entrance facilities, it would be inconsistent "with the goals of section 251" to require the unbundling of facilities that fall "outside of [SBC Connecticut's] local network. *Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 366.

- *Third*, the Commission has concluded that incumbent LECs need not unbundle hybrid copper-fiber loop facilities provided that they offer either a pure copper loop running from the central office to a particular customer premises or a narrowband transmission path running over the hybrid facilities. *See id.* at 17153-54, ¶ 296. Because the HFC facilities are "equivalent" to hybrid loops, and because SBC Connecticut offers unbundled narrowband transmission facilities to its end users, the *Final Decision* is directly inconsistent with the Commission's unbundling decision for hybrid facilities.

- *Fourth*, the Commission has made clear that network elements are available only to carriers seeking to provide qualifying narrowband voice services. *See id.* at 17067, ¶ 135. Although Gemini has never offered narrowband voice service to any of its customers, the DPUC ordered SBC Connecticut to turn over HFC facilities throughout the state of Connecticut based on nothing more than Gemini's representation that it intends to offer qualifying voice service to some customer. Gemini's unenforceable promise to offer qualifying services to a customer somewhere in Connecticut cannot justify an order requiring SBC Connecticut to unbundle facilities that will be used throughout the state to provide broadband services.

- *Fifth*, while the Commission rejected an unbundling analysis that focused on "whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs," *id.* at 17056-57, ¶ 115, the DPUC focused exclusively on a single carrier and its business plan. The DPUC did not assess whether carriers would be competitively impaired in the absence of unbundling, nor did it consider the availability of facilities from alternative sources, including other network elements, self-provisioning, and third parties. *See id.* at 17035, ¶ 84, 17151, ¶ 291.

Ultimately, the DPUC's *Final Decision* directs SBC Connecticut to subsidize the business plan of a single CLEC. That is inconsistent with congressional intent, as expressed in the plain language of the 1996 Act, and will substantially prevent implementation of the federal unbundling regime. Moreover, it will frustrate this Commission's efforts to promote a vibrant market for broadband services, a goal that "is vital to the long term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies." *Triennial Review Order*, 18 FCC Rcd at 17110, ¶ 212.

The *Triennial Review Order* expressly invites parties to "seek a declaratory ruling from this Commission" where, as here, a state commission has ordered unbundling that is inconsistent with the 1996 Act and would frustrate the implementation of the federal regime. *Id.* at 17101, ¶ 195. Because the DPUC's *Final Decision* so clearly flouts the text of the 1996 Act and this Commission's implementing orders and rules, SBC Connecticut hereby seeks the declaratory relief that the Commission has offered.

SBC Connecticut faces imminent and irreparable injury, and therefore additionally requests that the Commission adopt an expedited comment schedule and complete these proceedings as rapidly as possible.[3] If allowed to stand, the DPUC's *Final Decision* will force SBC Connecticut to spend millions of dollars to upgrade and maintain the HFC facilities for the benefit of a single competitor. SBC Connecticut additionally will be forced to hire and train employees in the operation and maintenance of a technology that it does not and will never use to serve its own customers. Should the DPUC's decision eventually be declared unlawful, SBC Connecticut will never be able to recover any of these expenditures. Accordingly, SBC Connecticut requires emergency relief.

[3] To preserve its rights to judicial review, SBC Connecticut filed an administrative appeal of the DPUC's *Final Decision* in Connecticut state court within the 45-day time period permitted under state law. *See* Conn. Gen. Stat. § 4-183. SBC Connecticut asked the court to stay the effectiveness of the *Final Decision*, and that request will be heard on February 17, 2004. This matter, however, is most properly heard by this Commission and the Commission should act expeditiously to indicate that it will do so. Should this Commission declare the DPUC's *Final Decision* to be inconsistent with federal law, the state court could grant SBC Connecticut's appeal on that ground alone. *See* Conn. Gen. Stat. 16-247b(a) (DPUC unbundling decisions must be "consistent with federal law").

Background

A. Factual Background: SBC Connecticut's Hybrid Fiber-Coaxial Facilities

In 1995, SBC Connecticut began constructing an HFC network, parallel to, but separate and distinct from, the existing copper network that SBC Connecticut used to provide telecommunications services. Believing that it would eventually offer significant cost savings and efficiencies, SBC Connecticut designed the HFC network to be a replacement for its legacy copper facilities and to support a full suite of telecommunications, data, and video services.[4] This promise failed to materialize. In 1996, after several telecommunications carriers announced that they would no longer pursue an HFC strategy, the primary manufacturers and suppliers of HFC equipment and components decided to abandon the HFC marketplace. *See Final Decision* at 27. Because of this industry upheaval, and growing evidence that HFC did not offer a technologically feasible and economically viable platform for carrying telecommunications services, SBC Connecticut elected to forego its HFC plans.

In fact, SBC Connecticut never offered telecommunications services over the HFC facilities. *See* Declaration of John A. Andrasik ¶ 4 (Feb. 9, 2004) ("Andrasik Decl.") (attached as Exhibit C hereto). For a couple of years, SBC Connecticut did lease the coaxial portion of the HFC network to SNET Personal Vision, Inc. ("SPV"), which used the coaxial facilities to provide cable television service. But once it became apparent that SPV could not support the construction plans that had been adopted back in 1994, SPV petitioned the DPUC for a modification of its franchise agreement and a waiver of several build-out requirements that the DPUC had originally imposed. The DPUC recognized that the HFC technology had substantially changed since SPV began its cable rollout, and that market changes had

[4] A diagram showing the components of SBC Connecticut's HFC network, and comparing them to the legacy local network, is attached as Exhibit B hereto.

commercially impaired SPV's ability to meet its franchise obligations.[5] When, the following year, SPV petitioned the DPUC for permission to withdraw from the cable television marketplace altogether, the DPUC granted SPV's request.[6]

In its *Franchise Relinquishment Decision*, the DPUC also determined that 85 percent of SBC Connecticut's HFC facilities – including *all* of the facilities that are the subject of the DPUC *Final Decision* challenged in this Petition – were not used or useful for telecommunications.[7] Accordingly, those facilities were taken off of SBC Connecticut's regulated books and the attendant losses were borne by SBC Connecticut's shareholders. A significant portion of these facilities have been physically removed – including the HFC RX-TX Splitters and the CATV Head Ends formerly located in SBC Connecticut's central offices, more than 50 percent of the drops and network interface devices ("NIDs"), batteries, active and passive devices, and portions of the coaxial cable. *See* Andrasik Decl. ¶ 6.[8] The remaining 15 percent of the facilities, which consist exclusively of fiber, remained on SBC Connecticut's books and are today made available to any requesting carrier on an unbundled basis, in accordance with SBC Connecticut's obligations under section 251(c)(3) of the 1996 Act and this Commission's implementing decisions.

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[5] *See* Decision, *Application of SNET Personal Vision, Inc. to Modify Franchise Agreement*, Docket No. 99-04-02 (DPUC Aug. 25, 1999).

[6] *See* Decision, *Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity*, Docket No. 00-08-14 (DPUC Mar. 14, 2001) ("*Franchise Relinquishment Decision*").

[7] *Id.*

[8] Without conducting an inventory, which would cost in excess of $500,000, SBC Connecticut cannot precisely identify the facilities that have been taken down. SBC Connecticut stopped maintaining property records for these facilities once they were removed from the company's regulated accounts.

B. Statutory and Regulatory Background: The DPUC's State Law Authority

In the mid-1990s, the State of Connecticut elected to open up the market for local telecommunications service, and adopted legislation intended to establish a competitive regime. Among other goals, Connecticut Public Act 94-83, entitled "An Act Implementing the Recommendations of the Telecommunications Task Force," was intended to "promote the development of effective competition as a means of providing customers with the widest possible choice of services." Conn. Gen. Stat. § 16-247a(a)(2). Following the adoption of the federal 1996 Act, the State of Connecticut passed Public Act 99-222, "An Act Concerning Competition in the Telecommunications Industry," to bring Connecticut into conformity with federal law.

Connecticut law incorporates federal law in numerous respects. Section 16-247b(a) of the Connecticut General Statutes, for example, upon which the DPUC purported in part to base its *Final Decision*, authorizes the DPUC,

> On petition or its own motion . . . [to] initiate a proceeding to unbundle a telephone company's network, services and functions that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, *are consistent with federal law* and are technically feasible of being tariffed or offered separately or in combinations.

Conn. Gen. Stat. § 16-247b(a). Section 16-247a(b)(7), in turn, provides that "'network elements' means 'network elements,' as defined in 47 USC § 153(a)(29)." Conn. Gen. Stat. § 16-247a(b)(7). Accordingly, under both Connecticut and federal law, a network element is defined to include "a facility or equipment used in the provision of a telecommunications service." Since "'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used," 47 U.S.C. § 153(46), Connecticut and federal law each define a network

element as any facility or equipment used in offering telecommunications directly to the public for a fee.

When acting pursuant to its state law authority, the DPUC is subject to federal statutory and regulatory limits. Section 251(d)(3) of the 1996 Act, for example, permits state commissions to adopt and enforce "any regulation, order, or policy" establishing "access and interconnection obligations," provided that any such order "is consistent with the requirements of [section 251] . . . [and] does not substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II of the 1996 Act]." 47 U.S.C. § 251(d)(3). In the *Triennial Review Order*, this Commission also concluded that any state unbundling action beyond that required by the FCC must be "consistent with the requirements of section 251 *and* [cannot] 'substantially prevent' the implementation of the federal regulatory regime." *Triennial Review Order*, 18 FCC Rcd at 17100, ¶ 193; *see also* 47 U.S.C. § 251(d)(3). The Commission additionally recognized that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).

Triennial Review Order, 18 FCC Rcd at 17101, ¶ 195.

C. The Proceedings Before the DPUC

On June 25, 2002, Gemini sent SBC Connecticut a request to initiate negotiations pursuant to section 252 of the 1996 Act. Gemini specifically sought access to SBC Connecticut's retired HFC network on an unbundled basis under 47 U.S.C. § 251(c)(3) and Connecticut General Statutes § 16-247b, at prices set according to the network's total service

long run incremental costs. After a meeting with Gemini's representatives, in which SBC Connecticut sought clarification of Gemini's request and described the nature of the HFC facilities, SBC Connecticut sent a series of letters explaining that the facilities in question were not subject to unbundling under federal or state law. In particular, SBC Connecticut explained that neither this Commission nor the DPUC had ever held that hybrid fiber-coaxial facilities had to be unbundled. SBC Connecticut also noted that the HFC facilities were not a part of its local telecommunications network, and had never been used to provide telecommunications services. Accordingly, the HFC facilities fell outside of the statutory definition of a "network element." Furthermore, because competitive carriers such as Gemini could offer a full range of telecommunications services using the UNEs that SBC Connecticut does make available to every requesting carrier, Gemini could not possibly be impaired in its ability to provide such services without access to the HFC facilities.[9]

After missing the statutory deadline for requesting arbitration under section 252(b) of the 1996 Act, Gemini filed a Petition for a Declaratory Ruling with the DPUC.[10] In its Petition, Gemini asked the DPUC to "declare that certain [HFC] facilities owned by [SBC Connecticut] and formerly leased to [SPV] constitute [UNEs] and as such must be tariffed and offered on an element by element basis for lease to Gemini." Petition at 1. Gemini asserted that the HFC facilities fell within the definition of a "network element" and therefore had to be unbundled. *See id.* at 4-5. Gemini additionally asked the DPUC to initiate an expedited cost of service

[9] SBC Connecticut did offer to sell its remaining HFC facilities to Gemini at market prices. Gemini refused, and instead asked the DPUC to order SBC Connecticut to bear the costs associated with Gemini's market entry.

[10] *See* Petition for Declaratory Ruling, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC filed Jan. 2, 2003) ("Petition") (attached as Exhibit D hereto).

proceeding and to order SBC Connecticut to provide an immediate inventory of its remaining HFC plant.

SBC Connecticut filed a Motion to Bifurcate the Proceedings on January 10, 2003, wherein it asked the DPUC to adjudicate the legal question of whether it had any authority over SBC Connecticut's HFC facilities before considering the fact-intensive and complex issues associated with whether the various HFC facilities were subject to unbundling. When the DPUC took no action on its bifurcation request, SBC Connecticut filed a Motion to Dismiss Gemini's Petition on January 21, 2003.[11] Therein, SBC Connecticut also reiterated its bifurcation request, asking the Department to establish a carefully staged schedule that would avoid costly and unnecessary administrative proceedings.

The DPUC denied SBC Connecticut's Motion by order dated February 10, 2003,[12] reasoning that it had the statutory authority to consider Gemini's request because "the Petition acknowledges the requirements of §251(c)(3) of the [1996] Act and the Department's ability to require, pursuant to Conn. Gen. Stat. §16-247b(a), the unbundling of telephone company networks when conditions warrant." *February Order* at 4. The DPUC did, however, adopt a modified form of the bifurcation that SBC Connecticut had requested. While agreeing that legal issues should be decided in the first phase of the proceeding, the DPUC refused to limit that phase to the submission of legal briefs. According to the Department, "the nature of the underlying facts of the issues of this proceeding require greater discovery." *Id.* at 5. The Department explicitly left Gemini's request for a cost study and an inventory for Phase II, but

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[11] *See* Motion to Dismiss of the Southern New England Telephone Company, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC filed Jan. 21, 2003) ("Motion") (attached as Exhibit E hereto).

[12] *See* DPUC Letter to P. Garber and J. Janelle (Feb. 10, 2003) ("*February Order*") (attached as Exhibit F hereto).

appeared to leave open the possibility that essential components of the unbundling analysis – including whether it was technically feasible to unbundle the requested network elements, and whether carriers were impaired absent unbundled access to those elements – would be addressed as part of Phase I.

In accordance with the Scheduling Order that the DPUC issued in conjunction with its *February Order*, SBC Connecticut served interrogatories on Gemini on February 22, 2003. Among other subjects, those interrogatories sought information concerning the identity of the specific facilities to which Gemini sought access, whether unbundling such facilities was technically feasible, and how carriers would be impaired in the absence of unbundling. When Gemini refused to answer SBC Connecticut's discovery requests, SBC Connecticut filed a Motion to Compel Responses.

In considering SBC Connecticut's motion, the DPUC acknowledged that the record in the proceeding was virtually non-existent. Indeed, when DPUC Commissioner Goldberg convened a technical meeting on April 8, 2003, he opened the meeting by stating that "We need to put together a record. We don't have a very good record. In fact, the record in this proceeding stinks." 4/8/03 Tr. at 5 (attached as Exhibit G hereto). Nevertheless, the DPUC only granted SBC Connecticut's Motion to Compel with respect to one interrogatory, which asked Gemini to provide substantive evidence demonstrating how carriers could be impaired without access to SBC Connecticut's HFC facilities. Because Gemini's answer to this interrogatory was non-responsive – it was drafted by Gemini's in-house counsel, devoid of any facts, and devoted to legal argument – and because the DPUC ruled SBC Connecticut's remaining interrogatories to be beyond the scope of Phase I, the record remained devoid of evidence concerning any of the factual and mixed questions that had to be decided before the DPUC could require unbundling.

Thereafter, the parties submitted several rounds of comments and briefs focused largely on whether the HFC facilities were used for the provision of a telecommunications service and whether the DPUC had the legal authority to require unbundling. Following release of the *Triennial Review Order*, the DPUC reopened the docket and requested further comments on the affect of the *Triennial Review Order*, if any, on Gemini's Petition. As SBC Connecticut explained in its written comments, the *Triennial Review Order* independently compelled the dismissal of Gemini's Petition. Because the Commission had held, as a matter of binding federal law, that carriers are not impaired in their ability to provide basic voice service so long as incumbent LECs offer unbundled access to copper loop facilities, and because it was undisputed that SBC Connecticut offers such facilities, federal law precluded the DPUC from ordering SBC Connecticut to unbundle its decommissioned HFC facilities.

D. The DPUC's *Final Decision*

On December 17, 2003, the DPUC issued its *Final Decision*. Therein, the DPUC first acknowledged that "this proceeding has been bifurcated to address the legal issues." *Final Decision* at 24. After a lengthy discussion of the 1996 Act's unbundling standard, set forth in 47 U.S.C. § 251(d)(2), the evolution of the FCC's interpretation of the statutory necessary and impair standard, *see Final Decision* at 24-33, and the DPUC's authority under Connecticut state law, the DPUC concluded that the 1996 Act "provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC," *id.* at 34. Section 16-247b of the Connecticut General statutes, the DPUC continued, "also provide[s] the Department with the authority to require the unbundling of ILEC network elements." *Id.*

Having determined that it had the statutory power to require unbundling, the DPUC went on to reject SBC Connecticut's argument that it nevertheless lacked authority over SBC

Connecticut's HFC facilities because they had never been used, and were not readily capable of being used to provide telecommunications services, and therefore did not fall within the statutory definition of a "network element." According to the DPUC, facilities do not need to be "currently used" in order to satisfy the definition of a network element. *See id.* at 36 (quoting *UNE Remand Order*,[13] 15 FCC Rcd at 3845, ¶ 327). Rather, the DPUC claimed, "the FCC require[d] that unbundled access to network elements that are 'capable of being used' be provided to competitors." *Id.* Because the HFC facilities "[have] already been deployed and could be placed into service by Gemini," the DPUC concluded, it is irrelevant that they have never been used to provision telecommunications services. *Id.* Since the HFC facilities were "constructed in part and intended by the Company to provide a full complement of voice data and video services . . . , the capability existed for provision of those services and as such, the HFC network should be unbundled." *Id.* Accordingly, the DPUC held that SBC Connecticut's HFC network "meets the definition of a 'network element,' and therefore it must be unbundled." *Id.*

The DPUC also reasoned that the HFC facilities must be unbundled because they appeared similar to the hybrid loops addressed in the *Triennial Review Order*. Notwithstanding the FCC's holding that incumbent carriers *need not* unbundle hybrid loops so long as the incumbent offers a copper loop alternative, *see Triennial Review Order*, 18 FCC Rcd at 17153-54, ¶296, the DPUC inexplicably asserted that "the FCC has required" that "hybrid fiber loop components . . . be unbundled." *Final Decision* at 37. On the basis of the DPUC's conclusion that the HFC network and the hybrid fiber loop components were "equivalent," and its

[13] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

misreading of the *Triennial Review Order*, the DPUC concluded that "[t]herefore, these components should be unbundled." *Id.*

The DPUC did not seriously address SBC Connecticut's argument that the HFC facilities were not a part of the company's local telecommunications network and therefore could not be subject to unbundling. *See id.* at 38. Even though facilities outside an incumbent's local network cannot fall within the statutory definition of a network element, the DPUC dismissed this argument on the ground that it had "already determined that the HFC network is a network element that should be unbundled." *Id.*

Likewise, having already concluded that "the HFC network is a network element that should be unbundled," *id.*, the DPUC then purported to apply the "necessary and impair standard" that is itself a *prerequisite* to unbundling under the 1996 Act and the Connecticut General Statutes, *see id.* at 39. In considering whether carriers would be impaired in their ability to provide telecommunication services, the DPUC applied a test for impairment that had been vacated by the D.C. Circuit in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), and repudiated by this Commission on remand. The DPUC reasoned that "Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network," *id.* at 41, and that SBC Connecticut's "imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business," *id.* at 42. Refusing to consider the availability of other UNEs through which Gemini could provide narrowband service, the DPUC held that "[t]o require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market

uneconomic." *Id.* Accordingly, the DPUC reiterated its holding that SBC Connecticut's HFC network must be unbundled, and it directed SBC Connecticut and Gemini to negotiate the terms of an interconnection agreement under section 252 of the 1996 Act.

Discussion

I. The DPUC's Decision Directing SBC Connecticut To Unbundle Its HFC Facilities Is Contrary to Federal Law

A. SBC Connecticut's HFC Facilities Are Not "Network Elements" Potentially Subject to Unbundling Under the 1996 Act

Section 251(c)(3) of the 1996 Act and Conn. Gen. Stat. § 247b each, on their face, restrict unbundling to "network elements." Under federal law, which the Connecticut statute expressly incorporates, a network element is defined as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). "Telecommunications service," in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). Under the plain language of the 1996 Act, then, the unbundling analysis is restricted to facilities and equipment used in providing telecommunications for a fee directly to the public.

SBC Connecticut's HFC facilities, however, were never used in provisioning telecommunications to the public. The DPUC expressly recognized as much in its *Franchise Relinquishment Decision*, holding that the facilities that were the subject of the Gemini's Petition were neither used in nor useful to providing telecommunications. Neither the DPUC nor Gemini argued otherwise in the state commission proceedings.

Ignoring these statutory limits on its authority, the DPUC reasoned that SBC Connecticut's HFC facilities were subject to unbundling because they *conceivably* could be used to offer telecommunications service. Whether or not they were or had ever been part of [SBC

Connecticut's] network, the DPUC held, all that mattered was that the facilities "[have] already been deployed and could be placed into service by Gemini." *Final Decision* at 36.

In drawing this conclusion, the DPUC relied upon this Commission's treatment of "dark fiber" – *i.e.*, fiber optic cable that is installed in the ground but has not been attached to the electronics needed to "light" the fiber so that it can carry electronic signals. Because dark fiber is not only routinely used to provision telecommunication services, but also "easily called into service," the Commission had found that it fell within the definition of a network element. *See UNE Remand Order*, 15 FCC Rcd at 3845, ¶ 328; *see also Triennial Review Order*, 18 FCC Rcd at 17019, ¶ 58 (reaffirming *UNE Remand Order* definition of "network element"). But the SBC Connecticut HFC facilities satisfy neither of these standards. As the HFC facilities have never actually been used to provide a telecommunications services, their use certainly cannot be considered routine. Even with technological advances that may support such services, SBC Connecticut conservatively estimates that it would need to expend more than ten million dollars for the HFC facilities to "be called into service." *See* Declaration of Don McGregor ¶ 4 (Feb. 9, 2004) ("McGregor Decl.") (attached as Exhibit H hereto). Moreover, SBC Connecticut will need to develop new operating and support systems for the ordering, provisioning, maintenance, repair, and billing of the HFC facilities – an endeavor that even Gemini admitted will cost in excess of $5 million. *See* 12/10/03 Tr. at 51 (attached as Exhibit I hereto). And SBC Connecticut will be forced to hire and maintain a dual workforce, as well as to operate this HFC network, at an annual cost of nearly five million dollars. *See* McGregor Decl. ¶ 5.[14] SBC

[14] Although Gemini did offer to undertake the necessary repairs and upgrades, it would not be technically feasible for Gemini to do so. Among other obstacles, the coaxial facilities are overlashed on SBC Connecticut's gain and must be physically separated before they can be accessed. SBC Connecticut must perform all necessary upgrades and repairs in order "'to retain responsibility for the management, control, and performance of its own network'" – simply turning the facilities over to Gemini would undermine "'the reliability and security of the incumbent's network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements.'" *Verizon Communications v. FCC*, 535 U.S. 467, 535, 536 (2002) (quoting First Report and Order, *Implementation of*

Connecticut's HFC facilities clearly bear no relationship to any facility that the FCC has ever found to fall within the definition of a network element.

Further support for this conclusion can be found in this Commission's discussion of the network modifications that incumbent LECs can be required to undertake. In the *Triennial Review Order*, this Commission held that incumbent carriers must offer "routine modifications" to their networks, which were defined as "an activity that the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8); *see Triennial Review Order*, 18 FCC Rcd at 17371-77, ¶¶ 632-640. Under section 251(c)(3) of the 1996 Act, the Commission explained, incumbent LECs cannot be required "to *alter substantially* their networks" in order to provide access to unbundled network elements. *Triennial Review Order*, 18 FCC Rcd at 17371, ¶ 630 (emphasis in original) (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (striking down superior quality rules)).

Unlike the routine modifications addressed in the *Triennial Review Order*, the DPUC's *Final Decision* would require SBC Connecticut to spend millions of dollars to upgrade the facilities so that they could support telecommunications services. This extraordinary imposition goes far beyond the type of ordinary activities to "accommodate access to existing network elements" envisioned by this Commission. *Id.* at 17372, ¶ 633. The DPUC's order requires SBC Connecticut to perform modifications that it would never undertake for a requesting customer, as SBC Connecticut has never and will never offer service over its decommissioned HFC facilities. Indeed, it is precisely because it would require the expenditure of several million dollars to upgrade and maintain these facilities that they are not network elements – *i.e.*, facilities

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the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 296 (1996) (subsequent history omitted). Irrespective of Gemini's offer, the DPUC made clear that it expected SBC Connecticut to perform the requisite network modifications. *See Final Decision* at 38.

that are readily capable of being used to provide telecommunications services. The 1996 Act and this Commission's network modification rules clearly exempt the HFC facilities from unbundling.

B. The HFC Facilities Are Not a Part of SBC Connecticut's Local Network

Indeed, the HFC facilities are not and were never a part of SBC Connecticut's local telecommunications network, an additional prerequisite to unbundling. Rather, when SBC Connecticut first adopted an HFC strategy, SBC Connecticut purchased and deployed an entirely new and different type of equipment – including CATV Head Ends, RX-TX Splitters, and coaxial cable – from that utilized in its local network. SBC Connecticut constructed an overlay network that was separate and apart from its legacy facilities. *See* Exhibit B; Andrasik Decl. ¶ 4.

In the *Triennial Review Order*, the Commission restricted unbundling to facilities that were part of the incumbent LECs' local networks. When considering whether to require the unbundling of entrance facilities – *i.e.*, dedicated transmission facilities used to backhaul traffic between networks – the Commission distinguished facilities that "are an inherent part of the incumbent LECs' local network Congress intended to make available to competitors under section 251(c)(3)," from those that "are not inherently a part of the incumbent LEC's local network." *Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 366. To the extent that facilities "exist outside the incumbent LEC's local network," the Commission held, it would be inconsistent "with the goals of section 251" to require their unbundling. *Id.* That logic applies with equal force here: the DPUC's order directing SBC Connecticut to unbundle its HFC facilities is inconsistent "with the goals of section 251" and must give way to the supremacy of federal law. *See id.*; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law is invalid where it "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress"); *Triennial Review Order*, 18 FCC Rcd at 17100, ¶ 192 & n.613 (discussing preemptive effect of 1996 Act and FCC's implementing decisions).

C. The Commission Has Already Held that Incumbents Need Not Unbundle Analogous Hybrid Facilities

In the *Triennial Review Order*, the Commission directly addressed whether hybrid loop facilities should be subject to unbundling under the 1996 Act and reached precisely the opposite conclusion from the DPUC. This Commission first rejected the unbundling of hybrid copper-fiber loops for use in provisioning broadband services. *See id.* at 17149, ¶ 288. Any application of the section 251(c)(3) unbundling requirements to broadband facilities, the Commission reasoned, "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706." *Id.* By contrast, the Commission expected its decision rejecting the unbundling of broadband facilities to encourage CLEC "deployment of their own facilities necessary for providing broadband services to the mass market." *Id.* at 17150, ¶ 290.

With respect to narrowband services, the Commission narrowly restricted incumbent carriers' unbundling obligations for hybrid loops. After considering "the availability of other loop alternatives within the networks of incumbent LECs," the Commission held that CLECs would not be impaired provided that incumbent carriers offered unbundled access to homerun copper loops and to copper subloops. *Id.* at 17151, ¶ 291. Indeed, the Commission gave incumbent carriers an explicit choice between providing "a homerun copper loop . . . [and] a TDM-based narrowband pathway over their hybrid loop facilities." *Id.* at 17153-54, ¶ 296; *see also* 47 C.F.R. § 51.319(a)(2)(iii).

After repeatedly concluding that SBC Connecticut's HFC facilities "appear to be analogous" to the hybrid copper-fiber loops addressed by this Commission, *Final Decision* at 37, the DPUC reached a decision that flatly contradicts the *Triennial Review Order*. While this Commission held that incumbents need not unbundle hybrid loops, the DPUC held that the equivalence between the HFC network and hybrid loops *compelled* SBC Connecticut to unbundle its HFC network. *See id.* The DPUC disregarded the fact that SBC Connecticut offers competitive carriers either homerun copper facilities or a TDM-based narrowband transmission path to every mass market customer connected to SBC Connecticut's legacy local network. Even though this Commission had looked to "the availability of other loop alternatives within the networks of incumbent LECs," *Triennial Review* Order, 18 FCC Rcd at 17151, ¶ 291, the DPUC found that it was precluded from considering any such alternatives. *See Final Decision* at 42. And notwithstanding SBC Connecticut's offerings, the DPUC somehow concluded that SBC Connecticut's HFC network must "be unbundled because it is necessary in the provision of the FCC's qualifying services. Specifically, the [SBC Connecticut] HFC network offers Gemini an architecture that is more advanced and efficient than that of the Company's existing copper twisted pair." *Id.* at 40. The DPUC's *Final Decision* thus turns this Commission's treatment of hybrid loops on its head.

D. The DPUC Has Improperly Ordered SBC Connecticut To Unbundle Facilities for Gemini To Use in Offering Broadband Service throughout Connecticut Based on Gemini's "Promise" To Offer a Qualifying Service to Some Customer, Somewhere in the State.

Gemini does not provide qualifying services in the State of Connecticut. Even though it has deployed its own HFC facilities in a portion of the state, it does not offer basic telephone service – or any other qualifying service – over those facilities. When Gemini first approached

SBC Connecticut about the HFC facilities, Gemini made clear that it wanted access in order to provide broadband services.

Following the release of the *Triennial Review Order*, Gemini changed its tune. Gemini suddenly asserted that it intended to provide qualifying services if granted unbundled access to SBC Connecticut's decommissioned HFC facilities, notwithstanding the fact that Gemini does not offer such services over its own HFC network. In its *Final Decision*, the DPUC held that this generic commitment to provide some qualifying services to some customers was sufficient to sanction unbundled access to SBC Connecticut's HFC facilities. *See Final Decision* at 38 ("Gemini has committed to offering the FCC's qualifying services over [the HFC] facilities"); *id.* at 39 ("As long as Gemini offers the FCC's qualifying services, the [SBC Connecticut's] HFC network must be unbundled."). This generic commitment is insufficient as a matter of law.

In the *Triennial Review Order*, the Commission held that "in order to gain access to UNEs, carriers must provide qualifying services using the UNE to which they seek access." 18 FCC Rcd at 17067, ¶ 135. Because it is undisputed that the HFC facilities are currently incapable of supporting qualifying services, Gemini's generic commitment "to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services" (*Final Decision* at 39) is irrelevant. The DPUC did not hold, as it must, that Gemini must offer qualifying telecommunications services *prior to* utilizing the HFC facilities to provide its intended broadband services. Rather, it granted unbundled access to SBC Connecticut's HFC facilities without specifically requiring Gemini to offer qualifying services over those facilities. That the *Triennial Review Order* does not permit.

By directing SBC Connecticut to unbundle broadband facilities, the DPUC has threatened the "statutorily required balance" that this Commission has struck "between ensuring

competitive access and maintaining incentives to invest in next-generation networks." *Triennial Review Order*, 18 FCC Rcd at 17111, ¶ 213. This Commission has adopted a deregulatory approach to "help drive the enormous infrastructure investment required to turn the broadband promise into a reality," *id.* at 17110, ¶ 212, concluding that a decision to refrain from unbundling "will stimulate facilities-based deployment," *id.* at 17141, ¶ 272. The DPUC's contrary decision, which forces SBC Connecticut to spend millions of shareholders' dollars constructing a new coaxial broadband network just so that it can hand those facilities over to a competitor, threatens this "critical domestic policy objective" that the Commission has deemed "vital" to the country's economic health. *Id.* at 17110, ¶ 212. Because the DPUC has distorted the marketplace by forcing SBC Connecticut to subsidize the business plan of a single competitor, neither Gemini, SBC Connecticut, nor other prospective competitors have any incentive to invest in broadband facilities. The DPUC's *Final Decision* thus constitutes a direct assault on the deregulatory broadband policies adopted in the *Triennial Review Order*, and will substantially impair this Commission's efforts to promote the national policy objectives articulated in section 706 of the 1996 Act.

E. The DPUC's Unbundling Analysis Was Inconsistent with *Triennial Review Order*

Even if the DPUC could get past every one of the foregoing legal hurdles, it still could not require SBC Connecticut to unbundle the decommissioned HFC facilities without adhering to the statutory unbundling standard articulated in section 251(d)(2) as implemented by this Commission. *See* 47 U.S.C. § 251(d)(3) (state access requirements must be consistent with section 251 and cannot prevent implementation of the requirements of section 251); *see also Triennial Review Order*, 18 FCC Rcd at 17100, ¶ 193 ("Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and

does not substantially prevent the implementation of our federal regime."). The DPUC ignored these clear limits on any unbundling authority that it might otherwise possess.

In articulating the relevant analysis for implementing section 251(d)(2)(B) of the 1996 Act, this Commission expressly rejected any consideration of "whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs." *Id.* at 17056-57, ¶ 115. Yet the DPUC's *Final Decision* focuses exclusively on the prospective impairment that *Gemini* faces in implementing its business plan in the absence of unbundling. The DPUC reasoned that "Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network." *Final Decision* at 41. The DPUC additionally claimed that SBC Connecticut's "imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, *Gemini's business plan* and business." *Id.* at 42 (emphasis added); *see also id.* ("Gemini has expressed a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only [SBC Connecticut's] HFC network facilities (together with its requirement that it make those facilities available to its competitors) can satisfy those service needs."). Although this Commission held that "we cannot order unbundling merely because *certain competitors or entrants with certain business plans* are impaired," the DPUC did just that. *Triennial Review Order*, 18 FCC Rcd at 17056-57, ¶ 115 (emphasis added).

Contrary to the 1996 Act and the *Triennial Review Order*, the DPUC never considered whether competitive carriers generally face impairment in the absence of unbundling. Nor did it consider the availability of facilities from alternative sources, including (among other things) other network elements, as part of its impairment analysis. *See id.* at 17151, ¶ 291. Accordingly,

the DPUC ignored the very factors that this Commission held to be required by the 1996 Act, while relying exclusively on a factor that this Commission found to be prohibited by the statute. The DPUC's *Final Decision* is inconsistent with federal law and the federal unbundling regime, and cannot be permitted to stand.

II. This Commission Has Broad Authority To Declare the DPUC's *Final Decision* Inconsistent with Federal Law

The Commission has recognized that state commission determinations such as that made by the DPUC can threaten the implementation of the federal unbundling regime and thwart important federal statutory and regulatory policies. *See id.* at 17100, ¶ 192 & n.613. Accordingly, the *Triennial Review Order* expressly invites carriers facing such unlawful unbundling determinations to seek a declaratory order ruling that the relevant state commission decision was contrary to federal law and therefore invalid. *See id.* at 17101, ¶ 195 ("Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission."). That authority flows naturally from the section 251(d), which directs this Commission to "implement the requirements of [section 251]," and to "determine what network elements shall be unbundled." It has also been directly recognized by the Supreme Court. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("with regard to the matters addressed by the 1996 Act," "the federal government . . . unquestionably has" "taken the regulation of local telecommunications competition away from the States.").

Because unbundling involves important policy judgments, state commissions are bound by this Commission's determinations as to both the proper scope of unbundling and the factors relevant to the unbundling analysis. Where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be

promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (internal quotation marks omitted). As the federal courts have recognized, the 1996 Act requires this Commission to undertake a balancing of competing interests. *See Iowa Utils.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part); *USTA*, 290 F.3d at 427-28. Accordingly, once this Commission strikes the balance between the competing regulatory concerns, states may not depart from that federal judgment. Indeed, this Commission's decisions not to regulate – *i.e.*, decisions that unbundling is inappropriate or should be limited to narrowly defined circumstances – "take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" and preempt any inconsistent state regulation or requirement. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *see also Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 155 (1982).

The Commission has not hesitated to issue a declaratory ruling under appropriate circumstances in the past, particular when necessary to protect federal policies such as those articulated in the *Triennial Review Order*. In the BellSouth *Memory Call Order*,[15] for example, the Commission issued an order preempting a state regulatory decision that flouted the Commission's deregulatory policy for information services. And in the *Telerent*[16] proceedings, the Commission emphasized its "broad and discretionary powers" to issue declaratory relief where state action threatened federal jurisdiction. *See also* Declaratory Ruling, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of*

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[15] *See* Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992) ("*Memory Call Order*").

[16] *See* Memorandum Opinion and Order, *Telerent Leasing Corp. et al. Petition for a Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C. 2d 204, 213, ¶ 21 (1974) ("*Telerent*").

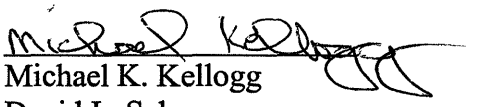
Section 315(b) of the Communications Act, as Amended, 6 FCC Rcd 7511 (1991) (discussing and exercising commission's authority to preempt state regulation); Declaratory Ruling, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 F.C.C.2d 1287, 1291 n.5 (1983) (discussing "the authority of the Commission to render declaratory rulings in the first instance regarding preemption; in making these rulings we are in a unique position to draw upon our expertise as a regulatory agency to determine whether national communications policies are adversely affected by conflicting State policies"). Because the DPUC's *Final Decision* violates the 1996 Act and this Commission's implementing regime in countless respects, it cries out for the exercise of the Commission's authority.

Conclusion

The DPUC's *Final Decision* is both unlawful and unprecedented. The DPUC has disregarded the federal unbundling regime, and compelled SBC Connecticut to spend more than million dollars to rebuild and maintain a second network for the benefit of a single competitor. Unless this Commission acts, and acts promptly, other states will be encouraged to follow suit, and forced subsidization will replace the competition envisioned by the 1996 Act.

Accordingly, SBC Connecticut respectfully requests that the Commission issue an emergency declaratory ruling holding that the DPUC cannot, consistent with federal law, require SBC Connecticut to unbundle its decommissioned HFC facilities. Because it faces imminent and irreparable harm, SBC Connecticut additionally requests that the Commission establish an expedited comment schedule that would direct interested parties to file initial comments within 10 days of the issuance of a public notice and reply comments within 5 days thereafter.

Respectfully submitted,



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